



The Only dUmb Question is the One You Don't Ask: How to Prepare for Direct Examination in Youth Court Cases

Presented by:

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DISCLAIMER!!



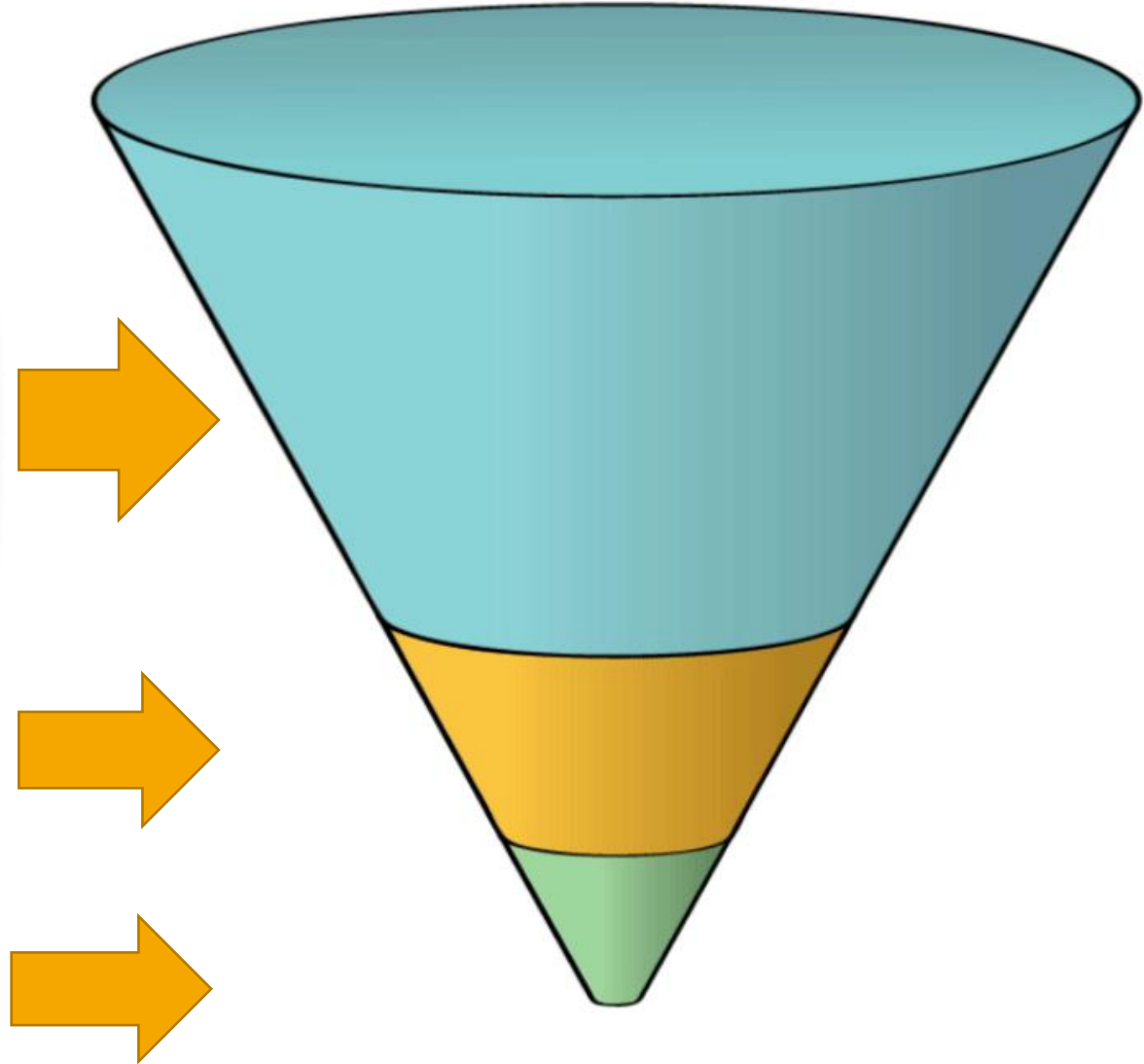
**Think
globally!**



Ensuring and protecting the right to call witnesses.

Thinking through the presentation of the witnesses.

Direct examination tips.

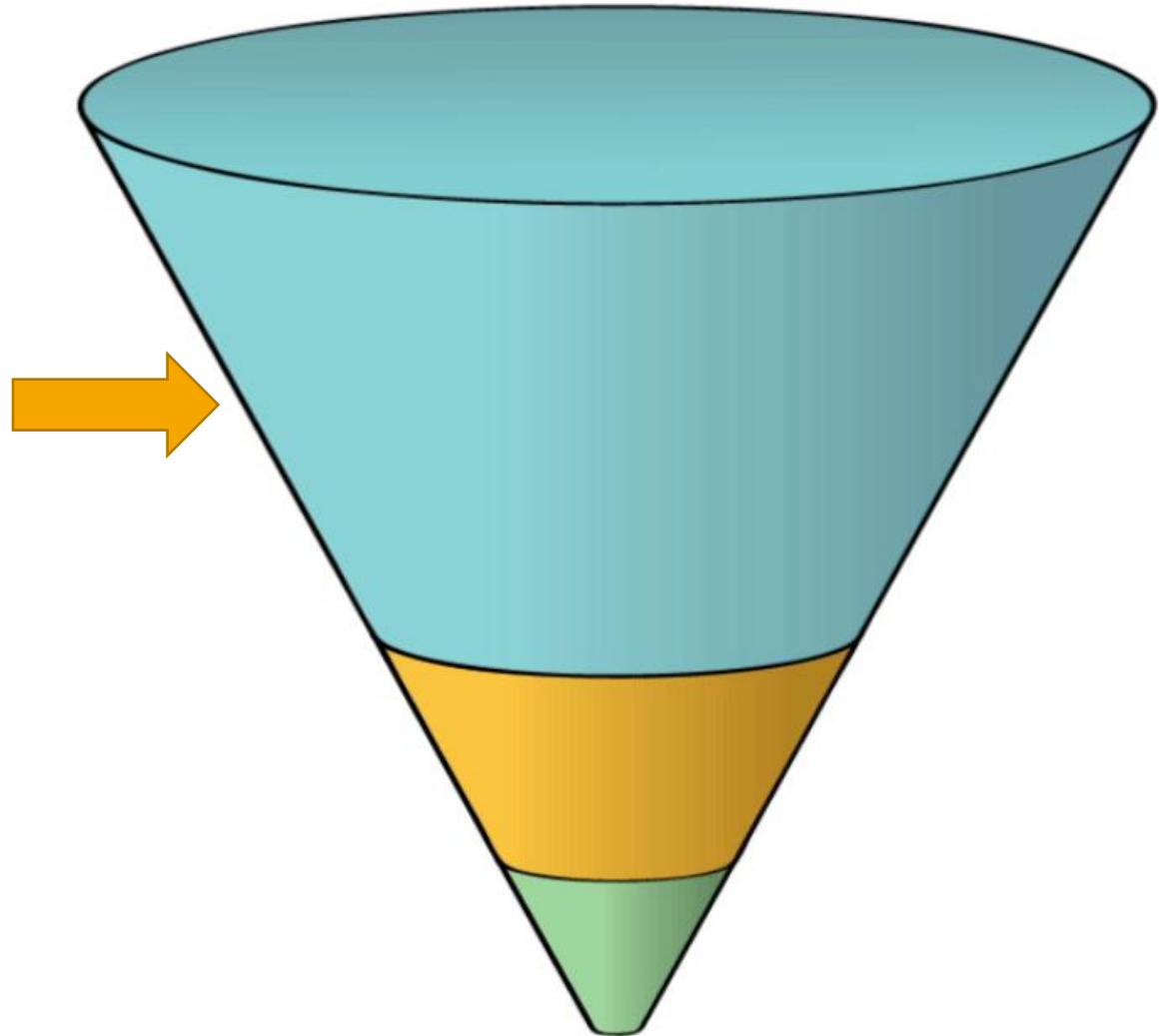




Outline

- Law governing direct examination
- Identifying defense witnesses and evidence
- Helping youth decide whether to testify
- Developing content for effective direct examination
- Techniques for effective direct examination

**Ensuring and protecting
the right to call witnesses.**



Law Governing Direct Examination

- Whether rooted directly in the Due Process Clause of the Fourteenth Amendment. . . or in the Compulsory Process of Confrontation clauses of the Sixth Amendment . . . **the Constitution guarantees criminal defendants [and juvenile respondents] a meaningful opportunity to present a complete defense.”** *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).
- Additionally, evidentiary rules may NOT limit the right to a defense:
 - **Rules of evidence may not be “applied mechanistically to defeat the ends of justice.”** *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (reversing a criminal conviction **because the state courts had applied a combination of standard hearsay principles and rules against impeaching one’s own witness to curtail the defendant’s efforts to prove that another man had confessed to the crime with which the defendant was charged.**)

Law Governing Direct Examination

- **Defense counsel should be prepared to make an appropriate proffer demonstrating that the evidence he or she seeks to introduce is important to the defense.** *See Crane v. Kentucky*, 476 U.S. 683 at 690-91; *cf. United States v. Valenzuela-Bernal*, 458 U.S. 858, 866-72 (1982); *United States v. Schaeffer*, 523 U.S. 303, 316-17 (1998).
- **Counsel should also argue:**
 - The trial judge should **exercise his or her state-law discretion in favor of the admissibility of evidence proffered by the defense if the question of admissibility is close.**
 - That the client has a **federally guaranteed “right to put before a jury evidence that might influence the determination of guilt.”** *Taylor v. Illinois*, 484 U.S. 400, 408 (1988) (dictum) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987)).

Identifying Defense Witnesses and Evidence

Categories of Witnesses

- Character witnesses
- Alibi witnesses
- Eyewitnesses
- Ear-witnesses (*e.g.*, witness who heard someone else confess or who heard the complainant give information about the incident)
- Custodian of records
- Client
- Expert witnesses (*e.g.*, witnesses who will say that robbery couldn't have happened the way the complainant said it did)
- Foundation witnesses (*e.g.*, witnesses who can testify about videos or camera shots taken by people in the neighborhood, nearby stores owners, school cameras, etc.)

Identifying Defense Witnesses and Evidence

Categories of Evidence

- Photographs, including booking photographs
- 911 tapes
- Police lookouts or “Radio Runs”
- Videos and surveillance, including TASER video cameras, camera phones, social media sites and surveillance cameras with footage from local stores, schools, phone applications
- Diagrams
- Map of Area
- Client’s clothing worn on day of alleged crime

Make sure to think through...

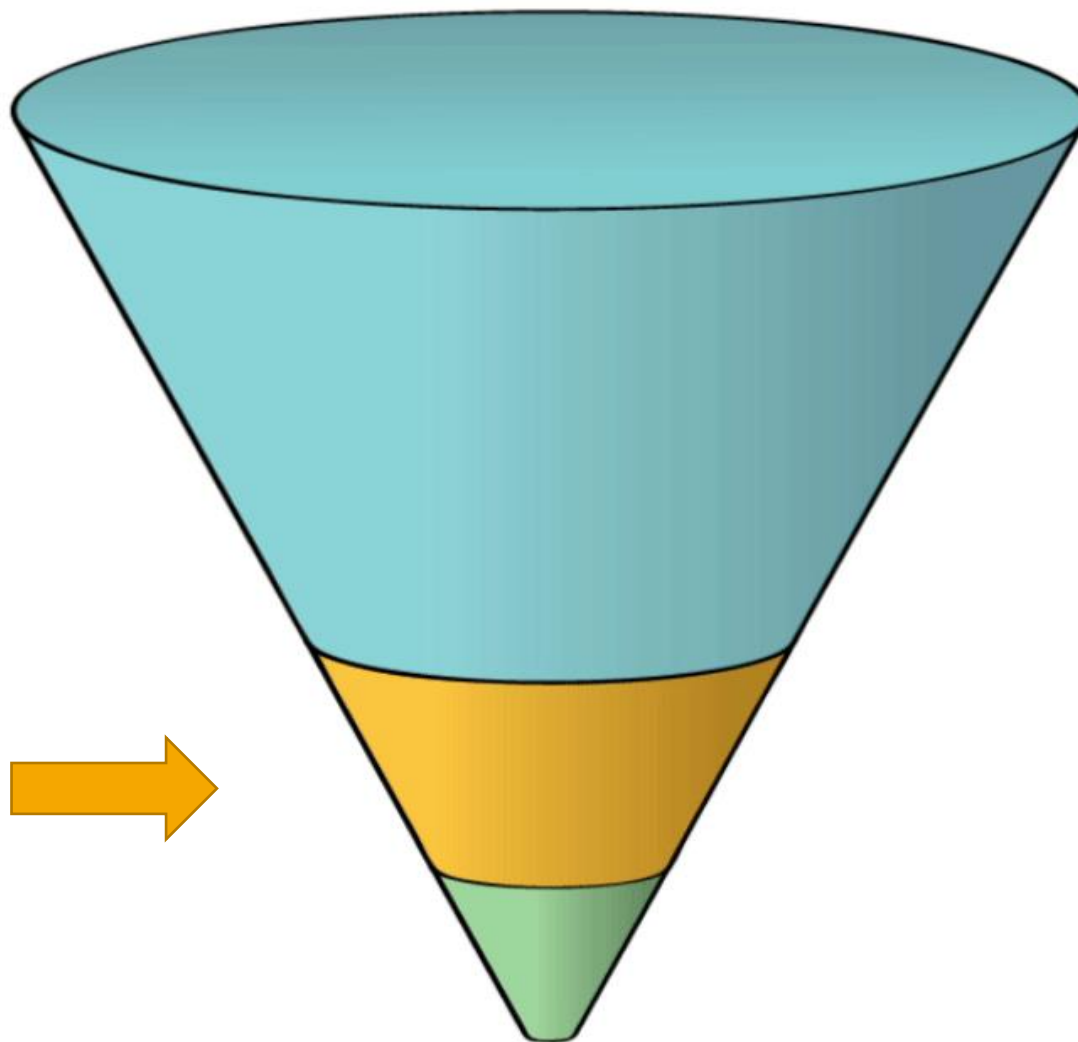
- Reciprocal discovery
 - Miss. R. Youth Ct. Prac. 24 (a)(5) (right to subpoena witnesses)
 - Miss. R. Youth Ct. Prac. 24 (a)(6)(ii) (court shall admit any evidence admissible in a criminal proceeding)
 - Miss. R. Crim. P. 17.3 (if [child] requests discovery under Rule 17, [child] shall...promptly disclose to the prosecutor...names and addresses of all witnesses, physical evidence, photographs, and data or information...any reports, statements or opinions of experts which the [child] may offer in evidence.
- Whether tangible evidence works how you'd expect it to...
 - Consider maps and how they may show things closer/farther away
 - **Make sure all photos advance your theory, not take away from it.**

Law Concerning the Right to Testify

- The privilege against self-incrimination also applies to juveniles. *In re Gault*, 387 U.S. 1, 55 (1967).
- **If the client does not testify, neither the prosecutor nor the judge may comment on the client's failure to testify other than to say that the client has the right not to testify and that no inferences can be drawn from the client's failure to take the stand.** *Griffin v. California*, 380 U.S. 609 (1965); *Lakeside v. Oregon*, 435 U.S. 333, 336-39 (1978).
- ****Special note** Neither can they comment on the child's right to not give a statement or explanation.** "Evidence of post-arrest silence is improper, because it violates the accused's right against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
- Ultimately, **decision whether to testify or not is up to the client, even if the defender strongly advises against it.** *Jones v. Barnes*, 463 U.S. 745, 751, 753 n.6 (1983) (dictum); *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (dictum).



**Thinking through the
presentation of the
witnesses.**



Discussion Concerning Right to Testify

- Whether the client has testimony that legally and factually supports the defense theory of the case (*e.g.*, is there an affirmative defense?)
- Whether the client wants to testify
- Whether other witnesses can testify to the same facts and information the client would provide
- Whether the client's testimony and demeanor on the stand are likely to appear credible
- Whether the client is likeable, sympathetic, or obnoxious
- How the client will appear in contrast to the complaining witness
- Whether the client's mental health should be considered, recognizing that while the client may be technically competent, questions as to whether they are verbally skilled, able to relate what happened and able to hold up to the pressure of cross-examination should influence the decision to testify or not
- Whether the court will allow accommodations for a client who has mental health issues
- Whether the client has a prior record that the prosecutor will elicit as impeachment if he or she testifies

Discussion Concerning Right to Testify

- Whether the client has made a prior statement that the prosecutor has and will likely use to impeach
- Whether there is some incriminating evidence, which is inadmissible in the prosecutor's case-in-chief because it was illegally obtained, but that may be used in rebuttal if the client testifies (i.e., because the evidence is inconsistent with the client's testimony)
- Whether evidence of the client's pretrial silence in the face of accusation is available and admissible to impeach the client
- Whether there is other potentially damaging information available to the prosecutor and whether prejudicial matters in the client's background are likely to be elicited on cross-examination
- Whether cross-examination of the client is likely to expose deficiencies or bolster weaknesses in the prosecution's case-in-chief
- Whether the judge has an expectation that the client should testify and may consciously or subconsciously penalize the client for failure to testify
- Whether there is some benefit to having the client appear that he or she has nothing to hide (e.g., in a jury trial when the jury may assume that the client's failure to take the stand suggests that he or she is hiding something)

What About Affirmative Defenses?

- The client may be the only person who can provide that testimony.
- The client's input may be emotionally compelling in such a case (e.g., vivid testimony about fear in a self-defense case).
- The fact-finder may be even more likely to expect the client to testify in such a case.

Whether to Actually Call Witnesses

Benefits

- Complete the factual narrative for the defense theory of the case (*e.g.*, provide alibi).
- Impeach or undermine the credibility of the prosecution's evidence.
- Have a better opportunity to observe events than the prosecution witnesses.
- Be more compelling and credible than prosecution witnesses.
- Provide facts that would otherwise have to be elicited from a client who does not wish to testify.
- Be expected to testify by the fact-finder who knows about his or her existence

Risks

- Fill in factual or legal holes in the prosecution's case.
- Preclude appellate review of the prosecution's case for sufficiency of the evidence based solely on the prosecution's case-in-chief. (Note: The youth would still be entitled to appellate review based on all of the evidence – prosecution and defense – heard at trial.)
- Be implicated in the alleged offense or otherwise undermine the defense theory of the case.
- Have other potentially damaging information about the facts of the case or the client's background that is likely to be elicited on cross-examination by the prosecutor.
- Shift the burden of proof from the government to the defense, **consciously or subconsciously**, in the fact-finder's mind.



How Can You Establish a Witness's Credibility?

- Personal background/profession
- Factual advantage (*e.g.*, the witness' opportunity to observe the event)
- Demeanor on the stand (Preparation is very important!)
- Basis of knowledge
- Consistency of testimony, both in and out of court (It is essential that the defender make sure there are no prior inconsistent statements.)
- Consistency with the physical evidence
- Lack of bias (both absence of bias or presumptive bias for the other side)
- Lack of a prior record
- Emotional state at the time of observation



Theory of the Case

- Clear, simple story for what has brought us before the Court
- Incorporates facts, legal bases, and emotional reasons behind a case
- NOT to be confused as the theme



Six Defense Theories

- 1. It didn't happen (rape cases/consent; vic is lying/mistaken)
- 2. It happened, but client didn't do it (mistaken ID; alibi)
- 3. It happened, client did it, but legal excuse (duress, self-defense, justification)
- 4. It happened, client did it, but not crime charged (lesser included)
- 5. It happened, client did it, but not legally responsible (intoxication; insanity)
- 6. It happened, client did, SO WHAT? (nullification)



Organization

- Present the case in the most persuasive and emotionally compelling way.
- Present a narrative about the event and scene that supports and advances the defense's theory.
- Chronology v. Thematic
- Primacy v. Recency



Book/Chapter/Page

- Consider the book/chapter/page approach.
- Book → Defense Theory of the case
 - Chapter → Theory of the witness
 - Page → Reasons why the witness supports the defense theory. One page per topic: Counsel should think in terms of a single goal for each page. For example: the witness had a good opportunity to observe the incident.



Book

- Theory of Defense: Self Defense



Chapter

- Observed alleged (complainant) as initial aggressor



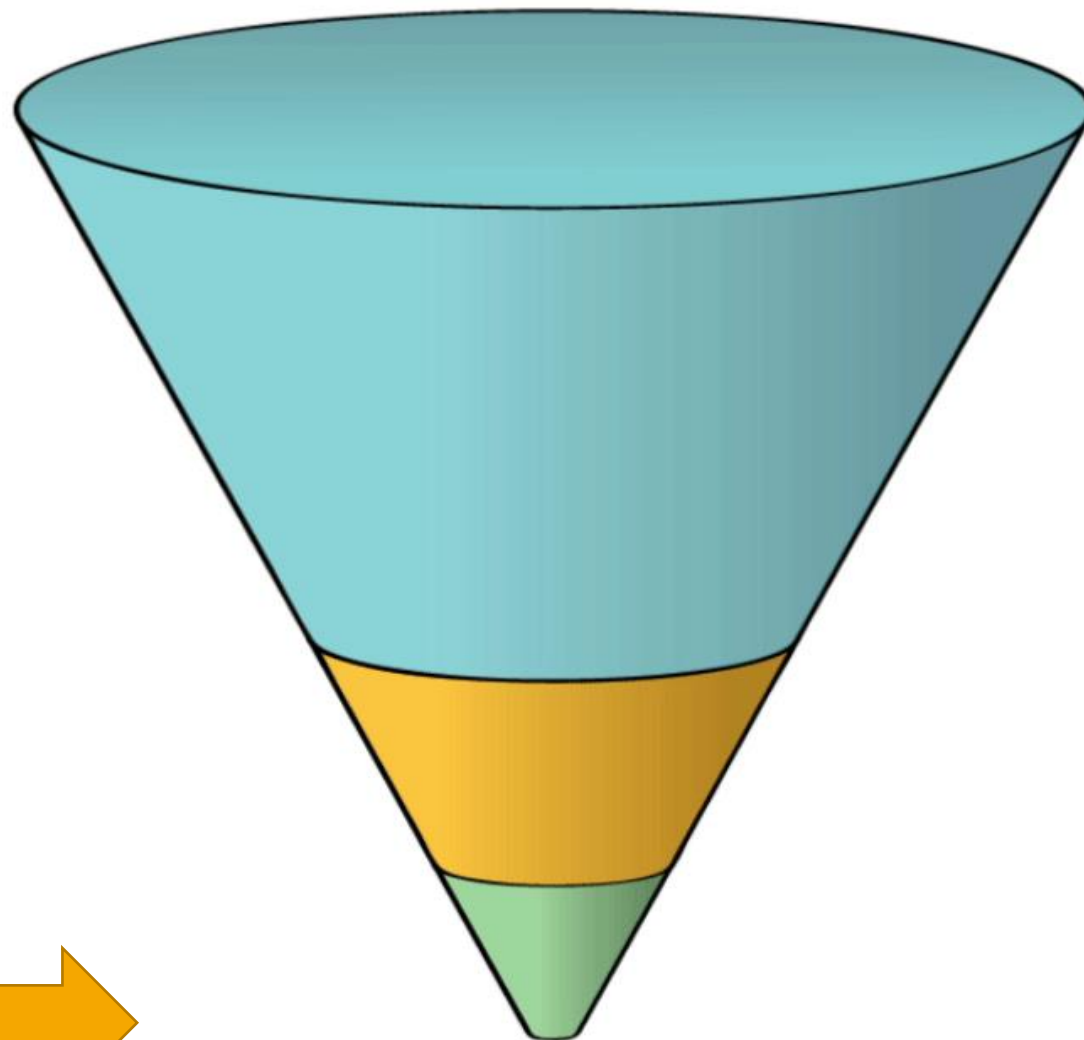
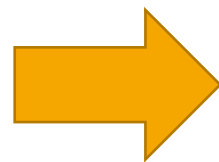
Pages

- Witness was at scene (Introduce why the witness is important without getting into the facts of the case.)
- Witness is credible (Personalize the witness with background information.)
- Witness was focused and had a good opportunity to observe the scene prior to the event
- Witness had good opportunity to observe the event
- Witness observed details supporting self-defense (observed complainant with a knife)
- Witness observed details supporting self-defense (observed complainant lunge at client with a knife)
- Witness observed no consciousness of guilt by the client
- Witness is not biased in favor of the client.
- Witness has no animosity towards the complaining witness
- Witness never saw the client threaten the complaining witness

Prepare, prepare, then prepare some more! (Witness Preparation)

- Explain to the witness the difference between direct and cross-examination, indicating the role of the different people in the court room, including the prosecutor.
- Moot the direct examination with the witness and have a colleague conduct a mock cross-examination.
- Teach the witness for what to do if they freeze on the stand (e.g., the witness should ask the attorney to repeat the question).
- Prepare the witness for common cross-examination questions, such as “Were you coached by the lawyer?”
- Teach the witness what various objections signify and what they should do when an objection is made while they are testifying.

Direct examination tips.



Techniques for Effective Direct Examination

Ask Open-Ended Questions, Not Leading Questions

- Who, What, Where, When, How, Why, Describe, Tell me...
 - On direct examination, the witness should give the answer; on cross-examination, the lawyer should give the answer.
 - The focus should be on the witness – not the attorney – during direct examination. The witness should provide the facts.
 - Direct examination is about answers while cross-examination is about questions.
 - The defender should spend time on what he or she wants the fact-finder to learn from the direct exam.



Techniques for Effective Direct Examination

No Compound Questions

- If the question calls for multiple answers, then it is a compound question.
- Compound questions are objectionable.
- Compound questions tend to confuse the witness, weakening their story.



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Techniques for Effective Direct Examination

Do Not Assume Any Fact that is Not in Evidence

- The defender's questions on direct exam should not contain any facts about which the witness has not already testified.
- The defender should remember that the fact-finder knows nothing. All of the details of the event, the scene or the names of people that have become familiar to the defender after preparation for trial have no significance to the fact-finder until counsel provides an explanation for them.
 - The question assumes, without demonstrating for the fact-finder, that the witness was there to see what happened.
 - The defender should establish this background information and create a visual for the fact-finder by asking foundational questions.
 - The defender should build up the witness' credibility and reliability as a witness who had a better opportunity to observe than the prosecution witnesses.



Techniques for Effective Direct Examination

Listen to Your Witnesses Carefully

- The defender cannot be wed to a script.
- Listening to the witness on direct examination is just as important as listening to the witness on cross. Often a witness, even a well-prepared witness, will give an answer that goes further than the defender expected, or perhaps not as far as the defender expected.
- The measure of success is not in how many of the defender's questions get answered, but how much of the desired information the defender is able to elicit from the witness.

Techniques for Effective Direct Examination

- Looping
 - Using part of the previous answer in your next question
 - Use only as a tool of emphasis. Ex. The guy who had the gun first.
 - Don't overdo it. Only do it for key facts.
- Use transitions and headlines
 - Ex. Mrs. Jones, I'm now going to ask you about the first weapon you saw.
 - Signals to fact-finder that you're moving in a different direction.
 - Provides a framework for the fact-finder and sets out the goals.

Techniques for Effective Direct Examination

Use Diagrams, Photographs, Other Exhibits, and Demonstrations

- Everyone is not an auditory learner!
- Even with a great storyteller, the listener often only **remembers the emotion** experienced while listening, the **vivid images** and the **general outline**. The listener may not always remember specific details.
- Diagrams, photographs, demonstrations and other visual aids **improve the fact-finder's comprehension**.
- In addition, **once the defender has laid the foundation for the exhibit**, he or she **can take the witness through the important part of the story again**. Repetition also aids aural comprehension. The defender gets to make the point twice while avoiding the “asked and answered” objection.

Redirect or No?

- You do not have to redirect, but if you do:
 - Confine questions to those that fall within the **scope of the cross-examination**.
 - Cross-examination **may open the door to questions on redirect that would otherwise be improper on direct** (e.g., rehabilitating a witness with a prior consistent statement or bolstering a witness' testimony with statements of accuracy and opportunity to observe).
 - Redirect is an opportunity to improve your case. This may include rehabilitating your witness or clarifying answers that were incomplete or not particularly clear.
 - Let the witness know that there may be an opportunity for redirect examination and **advise the witness that he or she does not need to be defensive or verbose during cross-examination**.



Techniques for Character and Alibi Witnesses

Character Witnesses

- The defender should consider introducing character evidence on behalf of the client, especially if the client has no priors.
- A character witness will be able to testify to the witness' own opinion of the client's character and to the client's reputation in the community, if known.
- The defender should recognize that the introduction of character evidence will generally open the door to prior bad acts and in some jurisdictions, to youth court adjudications or criminal convictions.
- Character evidence is generally only admissible to show:
 - Peacefulness, law-abiding nature
 - Truthfulness



Techniques for Character and Alibi Witnesses

Alibi Witnesses

- The defender may also consider an alibi witness when it is the defense theory of the case that the client was not present at the time or place of the offense.
- The defender should complete thorough investigation before calling an alibi witness to make sure there are no holes in the witness' testimony.
- In some jurisdictions, the defender may have to give the prosecution advance notice if the defense intends to call an alibi witness. The defender should be aware of any procedural rules in the local jurisdiction that apply to an alibi witness.



Next Steps

- As a group:
- Read the fact pattern.
- Identify potential witnesses, exhibits, other tangible evidence, including whether your client will testify.
- Determine your defense theory.
- Prepare a couple of chapters/pages for direct examination for one of your witnesses.